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No. 01-195

In the Supreme Court of the United States

VAN QUINTON LEAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's request to retain new counsel on the first day of trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 757 A.2d 739.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2000. A petition for rehearing was denied on January 19, 2001. Pet. App. 36a. On April 3, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 21, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Superior Court of the District of Columbia, petitioner was convicted of robbery, in

violation of District of Columbia Code § 22-2901. The court sentenced petitioner to five to fifteen years in prison, but suspended all but three years of the sentence. The court also sentenced petitioner to two years of probation. Pet. App. 35a.

1. On December 16, 1996, Matthew Sawalick was attacked from behind while riding a bicycle near DuPont Circle in Washington, D.C. Pet. App. 3a-4a. Sawalick's assailant pulled him off the bicycle and the two began to struggle. *Id.* at 4a. Petitioner picked up Sawalick's bicycle and rode away on it. *Ibid.* Sawalick broke free from his assailant and gave chase. *Ibid.* A police officer heard Sawalick's calls for help and apprehended petitioner. *Ibid.*

2. Petitioner, who was on parole at the time of the offense, was detained for parole board action after his arrest. Pet. App. 15a. Soon thereafter, he was appointed counsel under the Criminal Justice Act, 18 U.S.C. 3006A (1994 & Supp. V. 1999). Pet. App. 9a n.5. Petitioner's trial was originally scheduled for July 23, 1997, but it was continued to the next day because of the trial court's crowded calender. *Id.* at 15a.

On July 24, the government asked the trial judge to continue the case until September because Sawalick, the main witness against petitioner, was living in New York and needed knee surgery. Pet. App. 15a. At that time, petitioner asked the trial court to appoint a new lawyer because, he maintained, his current appointed counsel had not investigated the case. *Id.* at 9a n.5, 15a. The court warned petitioner that changing lawyers would further delay his trial. *Id.* at 15a. Petitioner said that he intended to retain his own lawyer, but asked the court to appoint another attorney for him in the meantime. *Id.* at 9a n.5, 15a. The court granted that request and appointed an attorney from the Public Defender

Service (PDS) to represent petitioner. *Ibid.* The court ultimately rescheduled petitioner's trial for December 16, 1997. *Id.* at 9a n.5.

Although on July 24 he had expressed an intention to retain counsel, petitioner did not proceed to retain counsel and he did not express dissatisfaction with his first PDS lawyer. Pet. App. 16a. On December 4, 1997, petitioner's counsel moved to withdraw and to have another PDS lawyer replace her because she had been transferred to PDS's appellate division. *Ibid.* The motion stated that the new PDS attorney had been briefed on the case and would be prepared to go to trial as scheduled on December 16. *Ibid.* The motion also stated that petitioner had met the new PDS attorney, understood the need for the replacement, and had no objection. *Ibid.* On December 8, 1997, the district court granted the motion. *Id.* at 9a n.5, 16a.

On the trial date of December 16, 1997, petitioner appeared with his new PDS counsel. Pet. App. 16a. Counsel informed the court that petitioner intended to plead guilty, but during the plea colloquy petitioner said that he wanted to go to trial. *Id.* at 16a-17a. Counsel advised the court that petitioner was thinking of retaining new counsel, but had said that it was "all right" for her to continue working on the case until petitioner made his decision. *Id.* at 17a. The court called a bench conference, and informed counsel that the trial could be delayed until March or April if petitioner hired a new lawyer. The court also told counsel that she should inform petitioner of that fact if she thought that it was appropriate to do so. The case was then continued until the next day. *Ibid.*

On December 17, 1997, petitioner's case was certified for trial before a different judge. Pet. App. 17a. That day, petitioner announced that he was willing to accept

the government's plea offer but asked to do so some time the following month. Gov't C.A. Br. 5. The government replied that its earlier offer had expired, and the trial court refused to delay the trial. *Ibid.* Petitioner declined the government's offer to plead guilty to the indictment. *Id.* at 6.

Petitioner then asked the court to appoint new counsel to represent him. Pet. App. 17a-18a. The court, noting that petitioner had already had one change of counsel and that it was the day of trial, asked petitioner whether and why he thought his current counsel was inadequate. *Id.* at 18a. Petitioner asserted that his PDS lawyer had failed to file necessary motions on his behalf and that she was not ready to go to trial. *Ibid.* Counsel advised the court that she thought her relationship with petitioner had "broken down," and that she did not think that she could "effectively represent him [because] he won't talk to me." Gov't C.A. Br. 7; see also Pet. App. 18a.

The court told petitioner that "the keys to having adequate representation are in your hands." Pet. App. 18a. The court said that petitioner was "entitled under the Constitution to have effective representation of counsel" but that he was "not entitled * * * to pick and choose your counsel or to have an attorney you like." *Id.* at 19a. Petitioner responded that he wanted a new lawyer because his PDS counsel "took on a whole lot of positions * * * pertaining to being within the government grounds" and that he did not want a lawyer "that is working in this government branch." *Ibid.* The court reminded petitioner that he could have hired his own lawyer if he had the money, and petitioner said that he had the money to do so. *Ibid.* The court told petitioner that he could not "make changes like that at the moment the government is ready for

trial and has witnesses en route." *Ibid.* The court also informed petitioner that his PDS counsel was independent of the prosecutor's office and worked only for him, but petitioner reiterated that he wanted a new lawyer. *Id.* at 19a-20a. The court told petitioner that he did not have the right to "change lawyers just as we're about to start trial" because "every time there is a change of lawyers, there has to be a delay, and this trial is not going to be delayed." *Id.* at 20a.

Petitioner's PDS counsel informed the court that petitioner had not been returned to the prison early enough the previous night to retain new counsel. Pet. App. 20a. The court replied that "[i]n any event, the trial date was set for yesterday. No judge will allow you to change lawyers on the day set for trial unless the government consents." *Ibid.* The court and the parties then selected the jury and court was adjourned for the day. Gov't C.A. Br. 9.

The next morning, petitioner entered the courtroom unwillingly, stating that he was "feeling real paranoid, sick, nausea and everything" and that he was "in no condition" to be there. Pet. App. 20a. While a nurse attended to petitioner, his PDS counsel argued motions to suppress the evidence against him. *Ibid.*; Gov't C.A. Br. 9. Counsel also renewed petitioner's request to obtain new counsel. Pet. App. 20a-21a. The court responded that it had "heard nothing from [petitioner] justifying a request for new counsel when everybody is ready to go to trial. It is, it seems obvious to the court that [petitioner is] simply trying every technique to avoid this trial." *Id.* at 21a. Petitioner protested that he was not trying to avoid trial, but stated that his counsel was unprepared and that he could not have "good conversations about the case" with her. *Ibid.* The court again denied petitioner's request for new

counsel. *Ibid.* The trial then commenced and petitioner was convicted.

3. The court of appeals affirmed. Pet. App. 1a-34a. The court rejected petitioner's claim that the trial court abused its discretion in denying his day-of-trial request to replace his court-appointed PDS counsel with retained counsel. *Id.* at 9a-14a. The court acknowledged that "[a]n accused who is financially able to retain counsel must not be deprived of the opportunity to do so," but noted that "the right to retain counsel of one's own choice is not absolute" because it "cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice." *Id.* at 9a-10a. The court noted that trial courts have "substantial discretion" in balancing an accused's right to change counsel against the public's "strong interest in the prompt, effective, and efficient administration of justice." *Id.* at 10a. The court concluded that the record reflected that the trial court had given "adequate consideration of the merits of [petitioner's] request, the preparedness of his appointed counsel, the prejudice to the orderly administration of justice, and the failure of [petitioner] to secure retained counsel despite adequate time to do so, among other factors." *Id.* at 13a.[1]

Judge Glickman dissented (Pet. App. 14a-34a), arguing that the trial court had "failed to perceive the constitutional underpinnings of [petitioner's] request for time to retain counsel of his choice, and failed to inquire into and evaluate the factors that it was required to consider." *Id.* at 21a. Judge Glickman agreed with the majority on the relevant factors that should be consid-

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[1] The court also rejected petitioner's claim that the trial court improperly refused to give a lesser-included offense jury instruction. Pet. App. 2a-8a. Petitioner does not renew that claim here.

ered, but disagreed that the trial court had adequately considered them. *Id.* at 24a-33a. Accordingly, Judge Glickman wrote that he would have vacated petitioner's sentence, noting that "if the trial judge denies a request for a continuance where it would have been fair and reasonable to have done so to enable the defendant to retain or substitute counsel, and thereby violates the defendant's Sixth Amendment right, the violation is made out, and harmless error tests do not apply." *Id.* at 33a-34a.

ARGUMENT

Petitioner contends (Pet. 7-18) that this Court should grant certiorari to consider whether a defendant needs to show prejudice to obtain a reversal of his conviction based on a violation of his constitutional right to select counsel of his choice. Because that question is not presented on the facts of this case, further review is unwarranted.

1. The Sixth Amendment right to counsel encompasses "the right to select and be represented by one's preferred attorney." *Wheat* v. *United States*, 486 U.S. 153, 159 (1988). That right, however, "is circumscribed in several important respects." *Ibid.* When a defendant requests a continuance to retain or substitute counsel of his choice, his Sixth Amendment rights must be balanced against the strong public interest in the prompt and efficient administration of justice. See, *e.g.*, *United States* v. *Poston*, 902 F.2d 90, 96 (D.C. Cir. 1990); *United States* v. *Gipson*, 693 F.2d 109, 111 (10th Cir. 1982), cert. denied, 459 U.S. 1216 (1983), overruled on other grounds by *United States* v. *Allen*, 895 F.2d 1577 (10th Cir. 1990); *Linton* v. *Perini*, 656 F.2d 207, 209-210 (6th Cir. 1981), cert. denied, 454 U.S. 1162

(1982); *United States* v. *Poulack*, 556 F.2d 83, 86 (1st Cir.), cert. denied, 434 U.S. 986 (1977).

Because "[t]rial judges necessarily require a great deal of latitude in scheduling trials," *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983), "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Id.* at 11-12 (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964)). On the particular facts of this case, the court of appeals correctly concluded that the trial court did not abuse its discretion in denying petitioner's request for a continuance to retain new counsel. That fact-bound determination does not warrant this Court's review. Cf. *Wheat*, 486 U.S. at 164 ("Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was 'right' and the other 'wrong.'").

2. Petitioner argues (Pet. 7) that the Court should grant review because "a circuit split has emerged on the issue of whether a defendant needs to show prejudice to demonstrate a violation of the constitutional right to counsel of choice." Petitioner asserts that some courts have held that "if a defendant receives adequate representation" then he cannot "demonstrate the prejudice" necessary "to show a violation of his constitutional right to counsel of choice." Pet. 8. Even if such a circuit split existed, but see pp. 9-12, *infra*, it is not implicated in this case.

Petitioner's argument improperly blurs the distinction between two separate questions: (1) the showing that is necessary to demonstrate an unjustified interference with a defendant's right to counsel of his choice; and (2) the showing (if any) that is necessary to

demonstrate that such interference warrants reversal of his conviction and a new trial. The issue on which petitioner seeks to have this Court grant review goes to the latter question. Further review is unwarranted because here the court of appeals concluded that petitioner had failed to prove an unjustified denial of counsel of choice, not that petitioner was required to show prejudice from such a denial or that any constitutional error was harmless.

Aside from a fleeting reference to the "absen[ce] [of] evidence that [petitioner's] trial counsel was ineffective" at the outset of its discussion, Pet. App. 9a, the court below did not engage in any analysis to determine whether petitioner was prejudiced by the trial court's refusal to grant a continuance to allow him to retain counsel. Rather, the court of appeals upheld the trial court's decision because the record "reflect[ed] adequate consideration of the merits of [petitioner's] request, the preparedness of his appointed counsel, the prejudice to the orderly administration of justice, and the failure of [petitioner] to secure retained counsel despite adequate time to do so, among other factors." *Id.* at 13a. It is true that the dissenting judge asserted (*id.* at 33a-34a) that violations of a defendant's right to counsel of his choice are prejudicial per se. But the majority did not disagree with that claim. Judge Glickman's position was that the majority had improperly determined that no constitutional violation occurred, not that it had wrongly decided that any error was harmless. *Id.* at 24a-33a. The question upon which petitioner asserts that the lower courts are divided is therefore not implicated in this case. Further review is unwarranted.

3. Morever, despite petitioner's claim to the contrary (Pet. 8-13), there does not appear to be a ripe

circuit conflict concerning the issue on which petitioner seeks review. Petitioner cites cases from four circuits to demonstrate that some courts have concluded that a defendant must show prejudice in order to obtain a reversal of his conviction based on a violation of his right to counsel of his choice. None of the cases cited by petitioner clearly adopts such a rule.[2]

Two courts of appeals whose cases petitioner cites have specifically stated that they have not decided the question upon which petitioner seeks review. In *United States* v. *Santos*, 201 F.3d 953 (2000), the Seventh Circuit suggested that a defendant might have to demonstrate prejudice in order to justify reversal of his conviction on the grounds that he was denied the right to select counsel of his choice. See *id.* at 959-961. But as petitioner acknowledges (Pet. 12) and the Seventh Circuit expressly stated, see 201 F.3d at 961, the *Santos*

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[2] Nor, contrary to petitioner's contention (Pet. 16), did this Court "intimate" in *Flanagan* v. *United States*, 465 U.S. 259 (1984), that a showing of prejudice is not required. In *Flanagan*, the issue was whether a pretrial ruling disqualifying counsel was immediately appealable under the collateral order doctrine. The Court noted that the defendants conceded that if denials of the right to counsel of choice did not require a showing of prejudice to obtain reversal, post-trial review would be fully effective and the disqualification order would not fall under the collateral order exception. *Id.* at 267-268. The Court did not resolve that issue, however, because it concluded that, if a showing of prejudice were required, the disqualification order would not "be independent of the issues to be tried," *id.* at 268, and on that basis could not be appealed under the collateral order doctrine, *id.* at 268-269. Accordingly, the Court noted that "whether or not petitioners' claim requires a showing of prejudice, a disqualification order does not qualify as an immediately appealable collateral order." *Id.* at 269. The Court had no need to, and did not, suggest an answer to the question whether prejudice is required.

court reserved that issue because it determined that the defendant was entitled to a new trial on other grounds, see *id.* at 961-966. Because *Santos* specifically reserved the relevant question, petitioner's argument that the Seventh Circuit previously decided it in *United States* v. *Turk*, 870 F.2d 1304 (1989), and *United States ex rel. Spurlark* v. *Wolff*, 699 F.2d 354 (1983), is unavailing.

Similarly, in *United States* v. *Voigt*, 89 F.3d 1050, cert. denied, 519 U.S. 1047 (1996), the Third Circuit observed that one of its earlier cases had "suggested, albeit in *dictum*, that nonarbitrary-yet-erroneous denials of the right to counsel of choice might be subject to harmless error analysis, and noted that no Third Circuit case has decided that issue definitively." *Id.* at 1074. *Voigt* had no occasion to resolve that open question of circuit precedent because the court ultimately held that the trial court had not violated the defendant's right to counsel of his choice. See *id.* at 1080.

Petitioner asserts (Pet. 11 n.2) that "[t]he First Circuit's position on this matter is less than crystal clear." In *United States* v. *Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987), the court held that violations of a defendant's right to counsel of his choice are prejudicial per se. See *id.* at 818 ("A defendant's choice of counsel cannot be reduced to a mere procedural formality whose deprivation may be allowed absent a showing of prejudice. The right to choose one's counsel is an end in itself; its deprivation cannot be harmless."). In *United States* v. *Prochilo*, 187 F.3d 221 (1st Cir. 1999), however, the court acknowledged that some of its cases could be read as suggesting that a defendant must sometimes show prejudice to obtain a reversal of his conviction. See *id.* at 227. The court ultimately held that a defendant is not required to demonstrate

prejudice from the improper denial of a continuance to permit him to retain new counsel in cases where the trial judge fails to conduct an inquiry into the reasons for the defendant's request for new counsel, and vacated Prochillo's conviction. See *id.* at 227-229. But even if the First Circuit's position is unclear or its cases are in tension, that would be a matter for the First Circuit to resolve.

The last case cited by petitioner is *United States* v. *Mendoza-Salgado*, 964 F.2d 993 (10th Cir. 1992). *Mendoza-Salgado* held that where a district court's denial of a continuance to permit a defendant to obtain new counsel is neither arbitrary nor unreasonable, a defendant cannot obtain a new trial without "identif[ying] specific prejudice" and demonstrating that "such prejudice render[ed] the trial fundamentally unfair." *Id.* at 1016. The Tenth Circuit's opinion is subject to more than one reading. Petitioner asserts (Pet. 10-11) that it holds that some violations of a defendant's right to counsel of his choice are subject to harmless error review and that others are not. But *Mendoza-Salgado* can also be read as holding that a district court does not violate a defendant's right to counsel of his choice unless its refusal to grant a continuance is arbitrary and unreasonable, while recognizing that such a refusal may implicate other constitutional values if it results in prejudice to the defendant that renders his trial fundamentally unfair. Because the Tenth Circuit has not had an opportunity to clarify its position, there is no ripe circuit split for this Court to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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